***THE HONOURABLE SRI JUSTICE P.S.NARAYANA**

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+Writ Petition No. 11049 OF 2003

% 14-03-2005

Union of India, Rep. By the Asst.Works Manager

Wagon Workshop, South Central Railway, Guntupalli

and Others …Petitioners

VS.

$ Abdul Kareem …Respondent

! COUNSEL FOR THE PETITINERS :R.S.Murthy

^ COUNSEL FOR THE RESPONDENT : S.Satyanarayana Prasad

< Gist :

> Head Note :

? CITATIONS :

1. AIR 1964 SUPREME COURT 600
2. 1991 (1) AISLJ, Volume, I Page 56

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

MONDAY, THE FOURTEENTH DAY OF MARCH
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE G. BIKSHAPATHY

and
THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION NO : 11049 of 2003

Between:

1. Union of India, Represented by

the Asst.Works Manager Wagon Workshop
South Central Railway, Guntupalli- 521241
2. The Chief Workshop Manager, Wagon Workshop, South Central

Railway, GUNTAPALLI-521241.
3. The General Manager, South Central Railway, Rail Nilayam,

Secunderabad.

..... PETITIONERS

AND

Abdul Kareem, S/o Abdul Sattar, D.No.76-2-47, Sayed galib Shaheed Darga, Bhavanipuram, Vijayawada.

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue appropriate writ order or direction particularly in the nature of writ of certiorari in declaring the Judgment dated 21-1-2003 in O.A.NO.1428 of 1998 on the file of the central Administrative Tribunal Hyerabad Bench as bed, illegal and viold and quash the same.

Counsel for the Petitioner:MR.R.S.MURTHY

Counsel for the Respondent: .MR. S.SATYANARAYANA PRASAD

The Court made the following :

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ORDER: (Per the Hon'ble Sri Justice P.S.Narayana)

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Writ Petitioners- Railways had questioned the order dated 21-1-2003 made in O.A.No.1428 of 1998 on the file of the Central Administrative Tribunal, Hyderabad Bench (herein after referred to as 'Tribunal') as bad, illegal, void and to pass such

other suitable orders.

2. Sri R.S.Murthy, learned counsel representing the Writ Petitioners-Railways had taken this Court through the contents of the affidavit filed in support of the writ petition and also contends that the very fact that for a long period of nine years, the absence was left unexplained properly, it can be taken that there was unauthorized absence without any justification and in the facts and circumstances, the order of termination was made. The learned counsel would also submit that the alleged medical treatment or the medical certificates which had been relied upon by the respondents cannot be believed in the facts and circumstances of the case. The learned counsel also had pointed out the findings recorded by the Tribunal in this regard and would comment that the constitutionality of exception II of Rule 732 of Leave Rules had been adverted to by the Tribunal, though, it may not be necessary to go into that aspect, at all in the present context. The learned counsel would comment that even otherwise, this question was not specifically raised nor the contention had been seriously canvassed. But, however, the Tribunal had gone into that aspect and made certain observations in this regard at para 12 of the impugned order.

3. The learned counsel would submit that at any rate, in the light of the reasons, which had been recorded while making order of termination, the question of holding any enquiry in this regard would not arise and definitely it cannot be said that the same is violative of Articles 311, 14, 16 and 21 of the Constitution of India, as had been observed by the Tribunal. The learned counsel would conclude that in the light of the same, the impugned order is liable to be quashed.

4. Per contra, Sri Satya Narayana Prasad, learned Senior Counsel representing the respondent would submit that at no point of time the termination order was served on the respondent. Only when such a stand was taken in a judicial proceeding, ultimately, the respondent came to know about the same. The learned counsel also pointed out that number of representations were made in this regard and would submit that in any event no person can be thrown out of service without following the procedure and here it is a typical case where at no point of time an opportunity had been given to this poor carpenter to explain his stand and in the light of the same definitely it is violative of Article 311 of the Constitution of India and also the principles of natural justice. The learned counsel also had further explained about the medical certificate, which had been relied upon by him. The counsel ultimately

would conclude that at some point of time, unless opportunity is given to a party, such a party may not be able to explain his stand and in the present case at no point of time, an opportunity had been given in this regard.

5. Heard both the counsel and perused the material available on record.

6. The respondent herein who is the applicant filed O.A.No.1428 of 1998 on the file of the Tribunal praying for quashing of the impugned order dated 17/19-2-1982 made by the Assistant Works Manager, Wagon workshop, Guntupalli and the letter dated 9-1-1998 passed by the Chief Works Manager and the letter dated 16-5-1994 issued by the General Manager declaring them as arbitrary, illegal, unconstitutional and violative of Articles 311 (1), 311(2), 14, 16 and 21 of the Constitution of India and to direct the respondents to reinstate him into service with all consequential benefits such as arrears of salary, allowances, promotions and increments etc., The Tribunal by order dated 21-1-2003 after recording certain findings, ultimately concluded as hereunder:

> *". In view of the above finding recorded that the said impugned order contained in the Memorandum dated 17/19-2-1992 issued by the Guntupalli Wagon Workshop authorities cannot be sustained and is liable to be set-aside this application is allowed declaring that the impugned order communicated through the letter of the General Manager, South Central Railway, dated 16-5-1994 to the applicant is arbitrary, illegal, unconstitutional without jurisdiction and violative of Articles 311(1), 311(2), 14, 16 and 21 of the Constitution and we hereby set-aside the same. As a consequence, the applicant is entitled for reinstatement into service forthwith, with all consequential benefits such as arrears of salary increment, promotion etc., from 15-10-1990 till the date of his reinstatement. The respondents shall comply with this order within three months from the date of receipt of a certified copy of this Order. No costs."*

7. The respondent/applicant while working as casual labour in Railway Electrification Project was appointed as temporary Khalasi on pay of Rs.196 in the scale of 196-232 by order dated 5-2-1980 and was directed to report for duty on 12-2-1980. It is stated that the respondent there after unauthorisedly had absented himself and stayed away from duties from 20-10-1981 to 15-2-1982 without any intimation. It is stated that the maximum leave which can be availed at a time is 120

days and leave on medical certificate could be availed for a period not exceeding two months on the basis of a certificate from an authorized Railway Medical Attendant. It is also stated that the respondent-applicant had not submitted any leave application nor sent any intimation and it was treated that the respondent had abandoned the service and the decision to this effect was taken vide order No. GR/M.227/24532, dated 17/19-2-1982 as a case of deemed resignation under Rule 732 of Indian Railway Establishment Manual Code Vo.1. Further a specific stand was taken by the Railways that it could not be communicated to the respondent/applicant in the absence of any particulars of his address and he was not available in the office premises. Hence, there was no scope for any enquiry to investigate into the factual position. It is also stated that the respondent-applicant approached Railways after a lapse of nine years i.e. on 14-10-1990 to take him back to duty on the strength of a medical certificate dated 8-10-1990 from a private doctor C.R.V. Rao, Vijayanagar Colony, Hyderabad. It was further stated that under Rule 510 of Leave Rules no Railway servant shall be granted leave of any kind for a continuous period exceeding 5 years, unless exceptional circumstances of the case otherwise determines. The respondent-applicant further made a representation dated 17-4-1993 received from the Ministry of Personnel and it was conveyed on 16-5-1994 in view of abandonment of the services without any intimation nor any permission, there is no scope for the applicant being taken back into service. In the said circumstances, the respondent-applicant approached the Central Administrative Tribunal, Hyderabad Bench against the communication dated 16-5-1994 in O.A.No. 1550 of 1994, dated 28-11-1994 and prayed for a relief, declaring the same as illegal, arbitrary and violative of Articles 311(2), 14 and 16 of the Constitution of India, with consequential benefits such as arrears of salary etc., He had also filed the Miscellaneous Application No. 44 of 1995. On 10-1-1995 based on the direction of the Tribunal, dated 21-12-1994 to file an application with a prayer to condone the delay from the date of representation dated 14-10-1990.

8. A detailed counter affidavit was filed by the Railways narrating the factual position and also taking the relevant pleas relating to unauthorized absence from 20-10-1981 and having absented for more than five years in contravention of Rule 510 of the Leave Rules, the respondent-applicant is not entitled to any relief. Attention to Rule 732 of Indian Railway Establishment Code 1971 was drawn which provide that a railway servant who remained absent from duty for period more than three months after grant of extra-ordinary leave is deemed to have resigned from service, while the

same has no application to the facts of respondent-applicant, since no leave was granted to him, at any point of time and it is a case of abandonment. The said rule was amended as Rule 530 of Indian Railway Establishment Code, 1985 with a provision to hold an enquiry under Note 4 of the said Rule vide Railway Board Circular No. E (P&A)1-84/CPC/LE-3, dated 23-3-1985. But, no enquiry could be held as the respondent/applicant did not represent to this effect up to 13-10-1990 and the representation dated14-10-1990 had to be considered under Rule 510 of the Leave Rules. It was further stated that the Tribunal vide order dated 2-9-1997 dismissed the Miscellaneous Application No. 44 of 1995 in O.A.No. 1550 of 1994 and gave the liberty to file a fresh O.A., challenging the termination order dated 17/19-2-1982. Subsequent there to the respondent-applicant gave representation on 1-10-1997 and on 20-11-1997, pursuant to the direction dated 2-9-1997 in M.A.No. 44 of 1995 in O.A.No.1550 of 1994 and prayed for the relief of reinstatement into service with back wages from 20-1-1982 and requested for personal hearing through his defence counsel, as there is no scope for enquiry to investigate the factual position with regard to the unauthorised absence as the private medical certificate is not valid and as the respondent is absented for a period exceeding five years from 20-10-1981 in violation of Rule 510 of Leave Rules, no charges have been framed being abandoned from service. It is further stated that the respondent-applicant did not substantiate or explain his claim in the said representation dated 20-11-1997 of his absence from 20-10-1981 to hold an enquiry as desired by him, except mentioning that Rule 732 of Railway Establishment Code (1971 Edition) was struck down by the Hon'ble Supreme Court in a case of ***Moti Ram Deka Vs. The General Manager, North East Frontier Railway .*** While Rule 732 of Railway Establishment Code was not the subject matter of the said decision. It was also further stated that Rule 148 (3) and 149(3) of the Railway Establishment Code, 1959, Vol. I came up for judicial scrutiny before the Honourable Supreme Court (Supra-I). It is stated that respondent-applicant was intimated on 7-1-1998 that in view of abandonment of service from 20-10-1981, there is no scope to take him back to service. Subsequent thereto respondent-applicant approached the Central Administrative Tribunal, Hyderabad Bench by filing O.A.No. 1428/98 challenging the order dated 7-1-1998 praying for the relief of quashing the orders dated 17/19-2-1982, 16-5-1994 and7-1-1998 and to reinstate him into service which had been referred to supra. As already stated above, the Tribunal ultimately granted the relief and questioning the same, the Railways had preferred the present writ petition.

9. As can be seen from the findings, which had been recorded by the Tribunal, the Tribunal was more carried away by the fact that Exception-II of Rule 732 had been already decided to be unconstitutional by the Apex Court and in the light of the same, certain findings had been recorded. The Tribunal had also placed reliance on ***Delhi Transport Corporation Vs. D.T.c. Mazdoor Congress and Others*** and certain other decisions also had been relied upon.

10. It is a peculiar case where for nine long years the respondent-applicant had kept quiet and suddenly he sets the law into motion praying for reinstatement on the ground that no reasonable opportunity had been given to him at any point of time to explain his stand and hence the impugned action is violative of Article 311 of the Constitution of India. Rule 510 of the Leave Rules reads as here under:

> *"Maxmimum amount of continuous leave: Unless the President, in view of the exceptional circumstances of the case otherwise determines, no Railway servant shall be granted leave of any kind for a continuous period exceeding five years"*

11. It is pertinent to note that taking into consideration the fact that for nine long years the respondent-applicant had kept quiet and suddenly made certain representations by taking a stand that he is entitled for reinstatement on the ground referred to supra. Evidently, the writ petitioner-Railways had taken a stand that in view of the long lapse of time, it is a case of abandonment of service and hence no enquiry need be conducted in this regard. Prima facie, the stand taken by the Railways cannot be said to be unjust or unreasonable for the reason that there is sufficient gap in between the date of initial absence and continuous absence for a long period of nine years and subsequent thereto the respondent-applicant suddenly approached the Railway Authorities by making representation for reinstatement. It is no doubt true that Railways had taken a stand that since the whereabouts of the respondent – applicant were not known and inasmuch as the respondent-applicant had never turned up to the place of employment or nearby, there was no possibility of conducting any enquiry in this regard and it was taken as abandonment of service and on that ground the order of termination was made. It is pertinent to note that the respondent-applicant is taking a very technical stand that though there is long lapse of time at no point of time opportunity had been given and without putting him on

notice and without affording any opportunity as required under Article 311 of the Constitution of India the order of termination of this nature cannot be made. This appears to be the substantial stand taken by the learned senior counsel representing the respondent/applicant. While considering this submission the conduct of the respondent-applicant also may have to be taken into consideration. By producing the medical certificate, stand had been taken by the respondent-applicant that due to that reason he was unable to approach the Railway Authorities. This Court is not inclined to express any opinion relating to the nature of the Medical Certificate, the genuineness or otherwise of the certificate at this stage for the reason that it is the specific stand taken by the respondent-applicant that no opportunity had been given to him to explain his stand in this regard. However, the direction given by the Tribunal to the effect that the respondent-applicant is entitled for reinstatement into service forthwith with all consequential benefits such as arrears, salary, increment, promotion etc., from 15-10-1990 till the date of his reinstatement in the considered opinion of this Court is definitely unreasonable and unjust especially in the light of the long lapse of time in between the commencement of unauthorized absence till the date of making representation. Hence, in this view of the matter, the said direction issued by the Tribunal in relation to the reinstatement of the services of the respondent-applicant forthwith with all consequential benefits such as increment, promotion etc., from 15-10-1990 till the date of reinstatement is liable to be set aside and accordingly the same is hereby set aside. In view of the fact that at some point of time opportunity to be given to the respondent-applicant, it is made clear that the competent authority shall put the respondent-applicant on notice, call for explanation in this regard, conduct enquiry and pass appropriate orders within a reasonable time, preferably within a period of three months from the date of receipt of a copy of this order.

The Tribunal observed at para 12:

> *12. Having regard to the above decision rendered by the Hon'ble Supreme Court, we have no hesitation to hold that the above referred note 2 to the Exception II of Rule 732 is unconstitutional and violative of Article 311 of the Constitution of India and the termination of the services of the applicant on the pretext of deemed resignation for his unauthorized absence during the above said period without holding any departmental inquiry against him, is null and void."*

12. It is made it clear that the constitutional validity of Rule 732 which is said to have been decided, need not be adverted to in the light of the views expressed by this Court as referred to supra.

13. In the light of the views expressed above the impugned order is accordingly modified and the writ petition is partly allowed to the extent indicated above. No order as to costs.

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G.Bikshapathy,J.

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P.S.Narayana, J.

14th March, 2005

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B/o

KM/TJS

ASSISTANT REGISTRAR

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SECTION OFFICER

To

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(for his lordships kind perusal)

One Fair Copy to the Hon'ble Mr. Justice P.S.Narayana

(For his lordships kind perusal)

1. Union of India, Represented by

the Asst.Works Manager Wagon Workshop
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2. The Chief Workshop Manager, Wagon Workshop, South Central

Railway, GUNTAPALLI-521241.

3. The General Manager, South Central Railway, Rail Nilayam,

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THE HONOURABLE SRI JUSTICE G.BIKSHAPATHY

AND

THE HONOURABLE SRI JUSTICE P.S.NARAYANA

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W.P.No. 11049 OF 2003

14th March, 2005